whose property is so seized to obtain judicial review of such action, and the constitutionality of such seizure in the absence of judicial review, under the Fifth Amendment.

The court below failed to consider these issues, although they were properly raised, and its judgment would sanction such seizure power, free from any judicial review, and establish a dangerous precedent in the administration of such power in the future, contrary to the firm position taken by this Court in circumscribing the permissible area of summary seizure without compensation, and attaching thereto as a constitutional requirement the right of judicial review.

## I. Are Summary Seizures of Property and Returns under the Trading with the Enemy Act Exempted from Judicial Review under the Administrative Procedure Act?

This Court has in the past held that the judicial review provisions of Section 12 of the Administrative Procedure Act should be given a broad interpretation. In the case of *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, it was held that agency actions under an immigration statute enacted after the Administrative Procedure Act, and including a finality provision, are reviewable. The Court said of Sections 10 and 12 of the Administrative Procedure Act:

> "Their purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act. And as the Court said in the *Heikkila* case, the Procedure Act is to be given a 'hospitable' interpretation."

The Administrative Procedure Act was enacted on June 11, 1946. Section 12 of that Act provides that:

> ". . . no subsequent legislation shall be held to supersede or modify the provisions of this Act, except to the extent that such legislation shall do so expressly."

Public Law 671 of the 79th Congress, under which petitioner was found eligible to have his property returned, was enacted on August 8, 1946, and contained no language excepting agency action thereunder from the review provisions of the Administrative Procedure Act, or incorporating by reference any previous legislation providing such exception. Accordingly Public Law 671 is subsequent legislation, and agency actions thereunder are subject to judicial review under Section 12 of the Administrative Procedure Act.

## II. Does a Person Whose Property Is Taken under the War Power Have the Right to Judicial Review of the Legality of the Taking?

In addition to the relief provisions under which petitioner's property was ordered returned, another provision is contained, in a separate section of the Trading with the Enemy Act (Section 9), for the filing of suits by persons who were not residents of enemy territory during a war period, provided suit is filed within two years. Petitioner was in a German concentration camp during much of the period, and after his release and immigration into this country, an order declaring him eligible for the return of his property, and ordering the full return of such property, was signed and published by the respondent under Public Law 671, prior to the expiration of the two year period. It was approximately seven years later, long after the period for filing suit under Section 9 had expired, that respondent issued a new order retaining the property. The effect of the decision of the court below was to deprive petitioner of any judicial review whatever under either statutory provision.

The seriousness of the denial of right of judicial review of summary seizure under the war power, under the federal Constitution, was expressed in the recent decision of this Court in *Societe Internationale* v. *Rogers*, 357 U.S. 197, as follows:

> "Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure."

There was no statutory provision authorizing the taking in 1955, but if Section 9 of the Trading with the Enemy Act is applicable, the two year period for filing suit thereunder must be construed to give petitioner the opportunity to challenge the taking, which is certainly not the case if the period is held to expire before the taking occurred. The necessity of such a construction, if the taking is to be found constitutional, was discussed by this Court in *Becker Steel Company* v. *Cummings*, 296 U.S. 74, in the following terms:

> "The seizure and detention which the statute commands and the denial of any remedy except that afforded by § 9(a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the non-enemy owner either the return of his property or compensation for it . . . In determining whether the remedy given is thus restricted it must be presumed that Congress intended that it should be constitutionally sufficient. The implication that by the appropriation of private property to public use the United States undertakes to make just compensation for it . . . must likewise enter into the construction of a statute giving to a non-enemy a remedy for the seizure of his property as a war measure. Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the government granted in recognition of an obligation imposed by the Constitution . . . Hence § 9(a) must be broadly construed to give effect to its remedial purpose."

The importance of providing such a remedy was pointed out in *Brinkerhoff-Faris' Company* v. *Hill*, 281 U.S. 673, 682, where the Court held:

> "Whether acting through its judiciary or through its legislature a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

This Court had recent occasion to say, in *Greene* v. *McElroy*, decided June 29, 1959:

> "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process."

Due process is not satisfied by mere formal procedural correctness. *Foster* v. *Illinois*, 332 U.S. 134, 136. Providing a statutory remedy which is, in fact, ineffective, does not fulfill the requirement. *Long Island Water Supply Company* v. *Brooklyn*, 166 U.S. 685, 695, *Leigh* v. *Green*, 193 U.S. 79, 90. The test is whether the practical effect is still the deprivation of property without due process or compensation. *Chicago, Burlington and Quincy Railroad Company* v. *Chicago*, 166 U.S. 226, 241. A person whose property is taken by administrative action has a right to challenge the validity of the taking.

As this Court said in *State of Washington ex rel Oregon Railroad and Navigation Company* v. *Fairchild*, 224 U.S. 510, 524:

> "So that when the taking is under an administrative regulation the defendant must not be denied the right to show that as a matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment."

If the taking in 1955 is to be rescued from unconstitutionality by the provision for judicial review under Section 9, that remedy must be shown to be an effective one. Here it was completely unavailing, since the time for

filing suit expired prior to the taking, unless the statutory period for filing suit can be construed as beginning to run in 1955, when the actual taking occurred through the purported amendment of the return order, resulting in the retention of petitioner's property.

### III. If Respondent's Action in 1955 Is Not Reviewable under the Trading with the Enemy Act or the Administrative Procedure Act, Such Action Was Invalid as a Taking of Property without Just Compensation and without Due Process of Law.

This Court has in the past struck down confiscatory actions taken under the guise of governmental power. The form of taking is not decisive, since the duty to compensate rests on the Constitution itself, and not statute. *Jacobs* v. *United States*, 290 U.S. 13. This applies to the exercise of the war power. *Mitchell* v. *Harmony*, 13 How. 134, *United States* v. *Russell*, 13 Wall. 629. The right to compensation for the taking of non-enemy property is based on the Constitution, and in the words of Chief Justice Marshall, writing in *United States* v. *Percheron*, 7 Pet. 51, even in the case of conquest "the modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged an felt by the whole civilized world would be outraged, if private property should be generally confiscated".

Protection of private non-enemy property from governmental seizure except where required in the public interest, and then only under such conditions as to guarantee just compensation and judicial review as to the legality of such seizure, is one of the foundations of our constitutional system, and to permit an administrative taking under conditions which do not satisfy those requirements strikes at the heart of that system.

## CONCLUSION

This case presents issues involving the basic right of persons whose property is taken by governmental action without providing compensation to seek judicial review to test the legality and constitutionality of such taking. The judgment of the court below, denying such right, is contrary to the decisions of this Court, and it is submitted that the effect of the precedent established by that judgment is of such far-reaching consequences as to call for consideration by this Court.

Respectfully submitted,

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United States Court of Appeals for the District of Columbia Circuit. Filed Apr. 16, 1959, Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1959

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No. 14,587

C.A. 5477-55

HELMUT LEGERLOTZ, APPELLANT,

v.

WILLIAM P. ROGERS, Attorney General of the United States, APPELLEE.

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Appeal from the United States District Court for the District of Columbia

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Before PRETTYMAN, Chief Judge, and WILBUR K. MILLER and WASHINGTON, Circuit Judges.

## JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment . . . of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge WASHINGTON.

Dated: Apr. 16, 1959.

# UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 14,587

HELMUT LEGERLOTZ, APPELLANT,

v.

WILLIAM P. ROGERS, Attorney General of the United States, APPELLEE.

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Appeal from the United States District Court for the District of Columbia

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Decided April 16, 1959

*Mr. Robert H. Reiter* for appellant.

*Mr. George B. Searls*, Attorney, Department of Justice, with whom *Mr. Irwin A. Seibel*, and *Miss Sharon E. King*, Attorneys, Department of Justice, were on the brief, for appellee. *Miss Marbeth A. Miller*, Attorney, Department of Justice, also entered an appearance for appellee.

Before PRETTYMAN, Chief Judge, and WILBUR K. MILLER and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge:* This is an alien property case, in which the central issue is whether plaintiff-appellant is barred by the statute of limitations.

On September 29, 1943, the Alien Property Custodian seized property belonging to the appellant. 8 FED.REG. 13271. Formal claim for the return of the property, satisfying the requirements of both Sections 9(a) and

32 of the Trading with the Enemy Act,[1] was filed on December 16, 1946.[2] On December 22, 1948, the Attorney General published a notice of intention to return appellant's property, pursuant to Section 32(f) and the appropriate regulations. 13 FED.REG. 8236. On March 3, 1949, the Attorney General published an order providing for the return of appellant's property, amounting to approximately $733,000. 14 FED.REG. 973. Substantial payments to plaintiff-appellant were made under the order of return. The sum of $30,612.51 was retained to cover tax liabilities. Some six and a half years later, on December 22, 1955, the Attorney General published an amended order of return, retaining the further sum of $48,317.94. 20 FED.REG. 9871. The Government says it retained this amount pursuant to the Blum-Byrnes Agreement between the United States and France.[3] Payment was made to appellant of the net amount remaining. Subsequently, the appellant filed suit in the District Court to require payment of the total retained amount of $78,930.45. Summary judgment for the appellee was granted on the ground that the statute of limitations had run on a suit under Section 9(a) of the Trading With the Enemy Act. The District Court also observed that there could be no judicial review of the Attorney General's actions under Section 32 of the Act. This appeal followed.

The main issue in the case is whether the plaintiff's suit under Section 9(a) was timely brought. Section 33 of the Act provides that "No suit pursuant to section 9 . . . may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure . . . or vesting . . . , but in computing such two years

[1] 40 Stat. 411 (1917), as amended, 50 U.S.C.App. §§ 1-40 (1952), as amended, 50 U.S.C.App. §§ 6b, 9, 20, 32, 33, 39 (Supp. V, 1958).

[2] According to the appellant, informal notice of claim had been filed in or around August of 1945. This will be discussed later in this opinion.

[3] 63 Stat. 2507 (1949).

there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) . . . ." The plaintiff argues that he had given an informal notice of claim prior to the two-year period and therefore the statute of limitations was tolled, or at least that there was a question of fact whether he did give such informal notice and therefore summary judgment should not have been granted. An inspection of the documents which he presented to the District Court, however, shows that his claim of having given informal notice in or around August of 1945 is essentially frivolous and not worthy of serious consideration. The court had the power to determine whether any "genuine issue of material fact" existed. FED.R.CIV.P. 56. It seems plain that there was no genuine issue.

Appellant further argues that the statute of limitations should not apply to him, under the circumstances here presented, quite apart from the contention as to informal notice. But the wording of Section 33 of the Act is very clear. If more than two years have elapsed since seizure and no tolling has occurred, no suit pursuant to Section 9(a). "may be instituted after April 30, 1949." *See Brownell* v. *Moriza Nakashima*, 243 F.2d 787 (9th Cir.), cert. denied, 355 U.S. 872 (1957); *Grabbe* v. *Brownell*, 247 F.2d 402 (2d Cir. 1957); *Pass* v. *McGrath*, 89 U.S.App.D.C. 371, 192 F.2d 415 (1951), cert. denied, 342 U.S. 910 (1952); *Pederson* v. *Brownell*, 129 F.Supp. 952 (D.Ore. 1955).

Section 33 is a harsh statute. But it must be pointed out that the plaintiff here had until April 1949 to bring suit under Section 9(a). It is true that he filed a formal claim in 1946 which was presumably valid under either Section 9(a) or 32(a), but proceedings under "sections 9(a) and 32(a) are independent and exclusive of each other." *McGrath* v. *Zander*, 85 U.S.App.D.C. 334, 337, 177 F.2d 649, 652 (1949).[4] Proceedings under Section

[4] For a detailed analysis of the differences between Section 9(a) and Section 32(a) proceedings see Comment, 62 YALE L.J. 1210, 1214-25 (1953).

9(a) are for the return of property to non-enemy aliens, and under Section 32(a), for the return of property to certain "technical enemies" and others deemed worthy of obtaining return. Furthermore, the very nature of a Section 32 proceeding could well have led the plaintiff to bring suit under Section 9(a) prior to April 30, 1949, even though the Government had indicated its intention to return the property, for it would seem that prior to return the property still remains vested in the Alien Property Custodian (or the Attorney General as his successor), and not in the claimant. According to Section 32(f) and Regulation § 502.107, 20 FED.REG. 7534, the notice of intention to return may be revoked at any time prior to return. Should the Attorney General revoke his intention to return on the basis of national interest, the claimant has no additional basis for suit, for Section 32(f) specifically states that "Publication of a notice of intention to return shall confer no right of action upon any person to compel the return of any such property . . . ."[5]

Nor does this court have jurisdiction under Section 32(a) to grant relief, either in a suit in equity or by judicial review of the Section 32 administrative proceedings, because by virtue of Section 7(c) the exclusive judicial remedy under the Act is to be sought under Section 9(a).[6] See *Tiedemann v. Brownell*, 96 U.S.App.

[5] Even if it were to be considered reasonable for the appellant to have relied on the acts of the Custodian in refraining from bringing suit under Section 9(a), the fact remains that estoppel cannot be used against the Federal Government. See Anderegg v. United States, 171 F.2d 127, 128 (4th Cir. 1948); *cert. denied*, 336 U.S. 967 (1949); *cf.* Wallace v. United States, 142 F.2d 240, 242 (2d Cir.), *cert. denied*, 323 U.S. 712 (1944). See also Andreae v. Redfield, 98 U.S. 225 (1878).

[6] Section 7(c) specifically states that "the sole relief and remedy of any person having any claim . . . shall be that provided by the terms of this Act . . . ." Section 9(f) specifies that except as provided in Section 9, property which is or has been vested in the Custodian "shall not be . . . subject to any order or decree of any court."

D.C. 9, 222 F.2d 802 (1955); *Hawley* v. *Brownell*, 94 U.S. App.D.C. 104, 215 F.2d 36 (1954); *McGrath* v. *Zander*, *supra*. By parity of reasoning, there can be no judicial review under Section 10 of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1952). *McGrath* v. *Zander*, *supra* at 336, 177 F.2d at 651.

For these reasons we conclude that the judgment of the District Court must be

*Affirmed.*